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NOTE AND COMMENT

INTERNAL REVENUE TAX ON STATE DISPENSARIES UPHELD.—No recent case, perhaps, has brought out more clearly than that of *South Carolina* v. *United States* (26 Sup. Ct. Rep. 110), the necessity which the written constitution is always under, of meeting new and unanticipated conditions. The question in that case was, whether the United States government can legally demand from the officers of the state dispensaries for the wholesale and retail sale of liquor, the regular license taxes prescribed by the United States internal revenue act. These dispensaries were established by several statutes of South Carolina, which also prohibited the sale of liquors in that state by any others than the official dispensers. The general limitations upon the power of the federal and state governments to tax each other's property and agencies had, of course, been pretty well settled by the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, and a long line of subsequent cases, many of which are cited and discussed by MR. JUSTICE WHITE in his dissenting opinion in the present case. But here, at least according to the majority opinion, is an effort by the federal government to tax officers of the state, engaged not in governmental functions, but in the private or corporate business of the state; and the point is made and strongly relied upon that the objections to and dangers attendant upon

permitting the federal government to tax any of the instrumentalities of *government* of a state cannot be urged against a license tax imposed upon the means by which the state acquires property in the pursuance of functions *not governmental* in nature. In the dissenting opinion MR. JUSTICE WHITE says that the United States Supreme Court has not recognized this dual nature of government and denies the appositeness of the reasoning of the majority of the court based upon its supposed existence. Granting that this distinction between the governmental and the corporate functions may be illogical, difficult to define and still more difficult to apply, the principle as a rule of law is too thoroughly embedded in the jurisprudence of this country, to be disturbed by any but positive rulings necessary to the decision by courts of last resort. The two cases cited by MR. JUSTICE WHITE certainly do no more than "point the other way," as he says. In neither case were the remarks on that subject necessary to the decision. *Barnes* v. *District of Columbia,* 91 U. S. 540, 23 L. ed. 440; *Workman* v. *New York,* 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. Indeed the distinction as to function, so far as municipal corporations are concerned, seems to be distinctly recognized in both the majority and minority opinions in the latter case.

But the application of the doctrine to the case in hand seems much more doubtful. Had the license tax been applied to the operation of one of the "public utilities" or other businesses which MR. JUSTICE BREWER, speaking for the majority of the court, anticipates may, some day be operated by the state, then the pertinence of this doctrine of "dual functions" would have been much clearer. But it can scarcely be denied that in conducting these dispensaries of liquor, the state was engaged in purely governmental functions. To be sure it was shown that the dispensaries yielded a profit of more than $500,000 during the year 1901; but that was merely incidental to the fundamental, if not the sole purpose of the statutes, namely, the regulation and control of the liquor problem. That such regulation and control is a legitimate governmental function pertaining to the police power of any autonomous state, is of course, too well settled to require citation of authorities. The constitutionality of the statutes creating the dispensary had already been expressly declared by the Supreme Court in *Vance* v. *Vandercook Co.* (No. 1), 170 U. S. 438. As it is true that the "power to tax involves the power to destroy" it would follow that if this license tax may be lawfully demanded of the dispensary officers, it might be made so high as to break down or make ruinously expensive the whole dispensary system, thus rendering impossible the method chosen by the state of exercising its police power in regard to the liquor traffic. It is no answer to this argument to say that Congress can be trusted not to exact exorbitant taxes; for as was said by CHIEF JUSTICE MARSHALL in *McCulloch* v. *Maryland,* supra, "this is not a case of confidence" but of constitutional law. If this reasoning be correct, one of the principal arguments of the majority of the court in support of their decision is not valid. Moreover it had already been held that a "state might not impose a tax on any property of the United States, including real estate of which the United States had become the owner as the result of a sale to enforce the payment of direct taxes previously levied by the United States." *Van Brocklin* v. *Tennessee,* 117 U. S. 151.

The majority of the court further argue that "the tax is not imposed on any property belonging to the state, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States* v. *Perkins,* 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and *Snyder* v. *Bettman,* 190 U. S. 249, 47 L. ed 1035, 23 Sup. Ct. Rep. 803. In the former case a succession tax of the state of New York was sustained, although the property charged therewith was bequeathed to the United States, the court holding that the latter acquired no property until after the state charges for transmission had been paid, saying, 'This therefore is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent and distribution.'" Admitting the force of this argument and of the precedents by which it is sustained, it yet seems difficult to escape the conclusion, that the prevailing opinion, if not a departure from what have been regarded as settled principles, is at least to some extent a new view of an old subject. In *Collector* v. *Day,* 11 Wall. 113, 20 L. ed. 122, MR. JUSTICE NELSON said, "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" Does not the application of this license tax to the officers of the state dispensaries of South Carolina tax, and in that sense, make subject to federal control, the "means employed in conducting the operations" of the government of South Carolina? And if it does, was the majority of the Supreme Court justified in being influenced by possible economic disaster to the government of the United States, should the several state governments at some future time take into possession not only the "public utilities" but other kinds of business and industry, thus making "it almost impossible for the nation to collect any revenues?"

H. M. B.

WHAT IS THE PRACTICE OF MEDICINE?—In a popular sense, and as ordinarily understood the practice of medicine is the applying of medical or surgical agencies for the purpose of preventing, relieving, or curing disease, or aiding natural functions, or modifying or removing the results of physical injury. *Stewart* v. *Raab,* 55 Minn. 20, 56 N. W. Rep. 256. But in some relations, and for some purposes, the expression has a more extended meaning. This is to be found sometimes in statutory provisions, sometimes in the decisions of the courts upon questions involving the construction of the expression and sometimes in both. Medical acts not infrequently state what shall be deemed to be the practice of medicine under them. But even where this is so, the courts are often called upon to interpret the words of the legis-